

FEDERAL AGENCY COMPLIANCE ACT

NOVEMBER 8, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEKAS, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1544]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1544) to prevent Federal agencies from pursuing policies of unjustifiable nonacquiescence in, and relitigation of, precedents established in the Federal judicial circuits, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Federal Agency Compliance Act”.

SEC. 2. PROHIBITING INTRACIRCUIT AGENCY NONACQUIESCENCE IN APPELLATE PRECEDENT.

(a) IN GENERAL.—Chapter 7 of title 5, United States Code, is amended by adding at the end the following:

“§ 707. Adherence to court of appeals precedent

“(a) Except as provided in subsection (b), an agency (as defined in section 701(b)(1) of this title) shall, in administering a statute, rule, regulation, program, or policy within a judicial circuit, adhere to the existing precedent respecting the interpretation and application of such statute, rule, regulation, program, or policy, as established by the decisions of the United States court of appeals for that circuit. All officers and employees of an agency, including administrative law judges, shall adhere to such precedent.

“(b) An agency is not precluded under subsection (a) from taking a position, either in administration or litigation, that is at variance with precedent established by a United States court of appeals if—

“(1) it is not certain whether the administration of the statute, rule, regulation, program, or policy will be subject to review by the court of appeals that established that precedent or a court of appeals for another circuit;

“(2) the Government did not seek further review of the case in which that precedent was first established, in that court of appeals or the United States Supreme Court, because neither the United States nor any agency or officer thereof was a party to the case or because the decision establishing that precedent was otherwise substantially favorable to the Government; or

“(3) it is reasonable to question the continued validity of that precedent in light of a subsequent decision of that court of appeals or the United States Supreme Court, a subsequent change in any pertinent statute or regulation, or any other subsequent change in the public policy or circumstances on which that precedent was based.”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 7 of title 5, United States Code, is amended by adding at the end of following new item:

“707. Adherence to court of appeals precedent.”.

SEC. 3. PREVENTING UNNECESSARY AGENCY RELITIGATION IN MULTIPLE CIRCUITS.

(a) IN GENERAL.—Chapter 7 of title 5, United States Code, as amended by section 2(a), is amended by adding at the end the following:

“§ 708. Supervision of litigation; limiting unnecessary relitigation of legal issues

“(a) In supervising the conduct of litigation, the officers of any agency of the United States authorized to conduct litigation, including the Department of Justice acting under sections 516 and 519 of title 28, United States Code, shall ensure that the initiation, defense, and continuation of proceedings in the courts of the United States within, or subject to the jurisdiction of, a particular judicial circuit avoids unnecessarily repetitive litigation on questions of law already consistently resolved against the position of the United States, or an agency or officer thereof, in precedents established by the United States courts of appeals for 3 or more other judicial circuits.

“(b) Decisions on whether to initiate, defend, or continue litigation for purposes of subsection (a) shall take into account, among other relevant factors, the following:

“(1) The effect of intervening changes in pertinent law or the public policy or circumstances on which the established precedents were based.

“(2) Subsequent decisions of the United States Supreme Court or the courts of appeals that previously decided the relevant question of law.

“(3) The extent to which that question of law was fully and adequately litigated in the cases in which the precedents were established.

“(4) The need to conserve judicial and other parties’ resources.

“(c) The Attorney General shall report annually to the Committees on the Judiciary of the Senate and the House of Representatives on the efforts of the Department of Justice and other agencies to comply with subsection (a).

“(d) A decision on whether to initiate, defend, or continue litigation is not subject to review in a court, by mandamus or otherwise, on the grounds that the decision violates subsection (a).”

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 7 of title 5, United States Code, as amended by section 2(b), is amended by adding at the end the following new item:

“708. Supervision of litigation; limiting unnecessary relitigation of legal issues.”.

PURPOSE AND SUMMARY

The Federal Agency Compliance Act, H.R. 1544, generally prevents agencies from refusing to follow controlling precedents of the United States courts of appeals in the course of program administration and litigation of their programs. The Committee on the Judiciary (hereinafter referred to as Committee) believes that citizens who file claims or who otherwise are involved in proceedings with federal agencies have the right to expect that those agencies will obey the law as interpreted by the courts. Moreover, the Committee believes that agencies must be discouraged from relitigating settled questions of law in multiple circuits. Unnecessary litigation is a needless expense for both the Government and private parties and a waste of limited judicial resources. The bill is based upon a recommendation by the federal judiciary that Congress “* * * enact legislation to—(a) generally prohibit agencies from adopting a policy of nonacquiescence to the precedent established in a particular federal circuit; and (b) require agencies to demonstrate special circumstances for relitigating an issue in an additional circuit when a uniform precedent has been established already in multiple courts of appeals.”¹

H.R. 1544 addresses the two kinds of agency nonacquiescence: intracircuit nonacquiescence—refusal to follow controlling appellate precedent within a specific federal judicial circuit; and intercircuit nonacquiescence—relitigating in other judicial circuits issues on which precedents have already been established in multiple circuits.² Regarding intracircuit nonacquiescence, the bill generally requires an agency and all agency officials who administer statutes and regulations within a given judicial circuit to follow relevant existing court of appeals precedent in that circuit. The Committee, however, recognizes that an agency should be able to assert a position contrary to precedent in limited circumstances, for example, such as when intervening legal, factual, or public policy developments may have undermined or changed the rationale for the earlier decision.

With respect to intercircuit nonacquiescence, the Committee believes that agencies should not repeatedly relitigate legal issues that have been consistently resolved against the Government, or one of its agencies, by multiple courts of appeals. The bill requires the Department of Justice and other agency officials in such situations to consider the following factors, among others, when deciding whether to pursue litigation: (1) the effect of intervening changes in pertinent law or public policy or circumstances on which the other courts of appeals’ decisions were based; (2) subsequent deci-

¹ Judicial Conference of the United States, Long Range Plan for the Federal Courts 34 (1995) (Recommendation 11).

² See Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679 (1989).

sions of the Supreme Court or the courts of appeals that previously decided the relevant question of law; (3) the extent to which that question of law was fully and adequately litigated in the earlier cases; and (4) the need to conserve the resources of the federal courts and non-agency parties to the litigation. Although these provisions discouraging intercircuit nonacquiescence are not subject to judicial review or enforcement, the bill requires the Attorney General to report annually to Congress on agency compliance.

The Federal Agency Compliance Act gives effect to the principle of *stare decisis*. An appellate court's decisions resolving legal issues form precedents, which thereafter serve as controlling law on the legal points resolved. *Stare decisis* as applied to precedents of a United States court of appeals has been referred to as the "law of the circuit" doctrine. Respect for controlling law provides stability and predictability to our judicial system facilitating settlement of disputes and freeing parties from relitigating established legal precedents. It promotes uniformity by treating everyone alike within a circuit and providing litigants with a sense of fairness, regardless of their financial means. H.R. 1544 ensures that federal agencies, as well as other claimants and parties, will respect the law of the circuit.

BACKGROUND AND NEED FOR THE LEGISLATION

Nonacquiescence is an agency's refusal to adhere to judicial precedent in handling or resolving a subsequent matter that presents the same question of law under sufficiently similar facts. As previously noted, H.R. 1544 addresses both types—intracircuit and intercircuit nonacquiescence.³

The routine practice of nonacquiescence generates significant social costs. Even though a party who challenges an agency decision in court may be certain to prevail based upon favorable precedent, that party nonetheless has been required to expend considerable resources to achieve that result. Moreover, the nonacquiescent agency may continue to apply its policy to those who are similarly situated, each of whom may ultimately have to file suit to obtain the relief previously deemed appropriate by the federal court. As a prerequisite to judicial review, those aggrieved by agency action must generally exhaust their administrative remedies, which may involve hearings before administrative law judges, applications to appellate boards, or other proceedings required under the relevant statute. Thus, the process whereby an aggrieved party ultimately receives the relief to which the party is entitled under judicial precedent can be costly and protracted.

Agency nonacquiescence has been an ongoing problem. In their study, Professors Samuel Estreicher and Richard Revesz trace the practice back to the 1920s,⁴ noting that since that time "many

³Mr. Gekas, the Chairman of the Subcommittee on Commercial and Administrative Law, with Mr. Frank of Massachusetts as an original cosponsor, introduced H.R. 1544 on May 7, 1997. Subsequently, Mr. Nadler, the Ranking Minority Member of the Subcommittee, among others, joined as cosponsor of the bill. On September 11, 1997, a substantially similar bill, S. 1166, was introduced by Senator Ben Nighthorse Campbell.

⁴The origin of the practice of nonacquiescence at the Internal Revenue Service is explained further in Gary L. Rodgers, "The Commissioner 'Does Not Acquiesce,'" 59 Neb. L. Rev. 1001, 1004–05 (1980) (footnotes omitted):

agencies have insisted, in varying degrees, on the authority to pursue their policies, despite conflicting court decisions.”⁵ The Social Security Administration (SSA) and the Internal Revenue Service (IRS) were among those agencies cited as having practiced nonacquiescence.⁶ In 1975, the report of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission) identified significant concerns about the impact of agency nonacquiescence practices.⁷ And in the 1980s, the Social Security Administration was strongly criticized by courts, legal scholars, and the Congress for its repeated nonacquiescence in the face of contrary appellate court rulings.⁸

The problem of agency nonacquiescence was also recognized at the beginning of this decade by the Federal Courts Study Committee (the Study Committee), which was established by Congress to perform a comprehensive review of the problems and issues facing the federal judiciary. In its report, the Study Committee recommended to Congress that the practice of agency nonacquiescence in administrative adjudication of Social Security disability claims be prohibited.⁹ The recommendation responded to an assertion by the Secretary of Health and Human Services (whose department at that time included the SSA) of a right to disregard the precedential holdings of the courts of appeals if the agency determined that the relevant court decisions were not in accord with its own policy. The Study Committee also called upon Congress to explore whether “legislative control” should be applied to other executive branch agencies as well.¹⁰

In its 1995 recommendation for legislation to address the continuing problem, the Judicial Conference of the United States noted that the practice of unjustified nonacquiescence “undermines the fundamental principle that an appellate court’s decision on a particular point of law is controlling precedent for other cases raising

Historically, the practice began in 1924 when the Tax Court was known as the Board of Tax Appeals. At that time there was no procedure for direct appeal from the Board’s decision. If the Service lost, it could bring suit in federal district court within one year to collect any deficiency disallowed by the Board. In order that taxpayers who were successful before the Board would not have to wait a full year to find out if the [S]ervice planned to appeal, the Commissioner would publish the decision to acquiesce or non-acquiesce.

⁵ See Estreicher & Revesz, *supra* note 2, at 681.

⁶ *Id.*

⁷ See Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, app. B at 349–61 (1975).

⁸ Estreicher & Revesz, *supra* note 2, at 681–82. During the 98th Congress, the House passed H.R. 3755, “The Social Security Disability Benefits Reform Act of 1984,” which barred SSA intracircuit nonacquiescence outright. The Senate took a somewhat different approach, instead mandating procedural safeguards whenever nonacquiescence was asserted. Although the relevant provisions in each bill were subsequently deleted, the Conference Report noted that the decision to eliminate them should “not be interpreted as approval of ‘non-acquiescence’ by a federal agency to an interpretation of a U.S. Court of Appeals.” H. Conf. Rep. No. 1039, 98th Cong., 2d Sess. 37 (1984), reprinted in 1984 U.S.C.C.A.N. 3095. During the 99th Congress, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee held hearings on “Judicial Review of Agency Action: HHS Policy of Nonacquiescence” at which a substantial body of testimony was received against the Social Security Administration’s practice. *Judicial Review of Agency Action: HHS Policy of Nonacquiescence: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (July 25, 1985).

⁹ Report of the Federal Courts Study Committee 59–60 (1990). In the Study Committee’s view, an exemption from this prohibition should be recognized for “test” cases designated by the Solicitor General.

¹⁰ *Id.* at 60.

the same issue.”¹¹ It went on to cite the practice’s “questionable propriety and inefficiency” and criticized it as “unfair to litigants, many of whom are pro se, who frequently are unaware of precedent favorable to their cases.”¹²

Testifying before the Subcommittee on behalf of the Judicial Conference, Judge Stephen H. Anderson of the United States Court of Appeals for the Tenth Circuit stated that nonacquiescence “violates all our concepts of the rule of law existing in this country for more than 200 years.”¹³ He added that it is unfair to individual claimants to force them to relitigate an issue that has previously been decided by an appellate court. Oftentimes, agency nonacquiescence discourages meritorious claimants from pursuing what is their right under favorable precedent. He stated:

This is a matter of the invisible statistic, the invisible citizen claimant. What happens to the mass of citizen claimants at the lowest level, the first desk of an agency’s consideration? That action we don’t know about. The only way that we know that something may be wrong is the announcement over and over again, one way or the other, by agencies that they have the right to disregard the law set by the circuit in which they conduct their affairs.¹⁴

John H. Pickering, Esq., testifying on behalf of the American Bar Association, emphasized the “lawless” aspect of nonacquiescence, a label he noted was applied by former Solicitor General Rex Lee.¹⁵ Pickering also observed:

Claimants, who are frequently indigent, should not be forced to relitigate legal issues on which the agency has not prevailed but refuses to follow or appeal. Judge Learned Hand once said that if democracy is to be preserved, there must be one commandment: “Thou shalt not ration justice.” By continuing to pursue its policy of nonacquiescence, the Social Security Administration is limiting access to the justice system, and thereby rationing justice, for: (1) the claimant who must pursue lengthy appeals to obtain a decision on an issue of law that could have been resolved at the agency level; (2) claimants whose cases are delayed because the agency’s resources are spent on duplicative efforts; and (3) claimants who may be denied timely access to the federal court system because the court is forced to consider anew, issues of law that it has already decided.¹⁶

The legal and policy concerns surrounding agency nonacquiescence have been the subject of substantial debate. In essence, agen-

¹¹ Long Range Plan for the Federal Courts, *supra* note 1, at 35 (commentary on Recommendation 11).

¹² *Id.*

¹³ Federal Agency Compliance Act: Hearing on H.R. 1544 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 105th Cong., 1st Sess. at 11 (1997) [hereinafter Compliance Act Hearing] (testimony of Hon. Stephen H. Anderson, Judge, U.S. Court of Appeals for the Tenth Circuit).

¹⁴ *Id.* at 16.

¹⁵ *Id.* at 64.

¹⁶ Compliance Act Hearing, *supra*, note 13, at 67 (testimony of John H. Pickering, Wilmer, Cutler & Pickering, on behalf of the American Bar Association).

cies consider it their responsibility to administer national programs with standards consistent throughout the country. They argue that adhering to divergent precedents established by the various courts of appeals detracts from this goal by fractionalizing those standards. In defense of intercircuit nonacquiescence, agencies argue that to freeze the law based upon a decision of one or two circuits prevents the “percolation” of issues that ensures comprehensive appellate review prior to final resolution by the Supreme Court.

The Committee believes, however, that equity and orderly governance require that agencies, like private citizens, should obey the law enunciated by courts of competent jurisdiction. If an agency disagrees with a court’s decision, it has several options. It can seek further review of the matter by the court of appeals (the same panel or en banc) or by the Supreme Court until the issue is finally resolved. It can also seek to vindicate its position in other courts of appeals and perhaps obtain review of the matter in the Supreme Court if conflicting rulings are obtained among the circuits.¹⁷ If the agency disagrees with the outcome of the judicial process, it can petition Congress to amend the law. This structure is consistent with the principle of separation of powers under which it is the courts’ constitutional role to interpret the laws governing agency actions.

It is true that today some agencies assert that they fully or generally acquiesce in controlling precedents.¹⁸ However, some agencies do not “acquiesce” in a particular court decision until agency officials review the judicial opinion and issue a directive to agency employees to follow the ruling in subsequent administrative proceedings.¹⁹ Thus, some agencies appear to treat controlling precedent as having no binding effect until the agency interprets such precedent and determines how it should be implemented.²⁰ Under

¹⁷Critics argue, however, that the agencies can go to unreasonable lengths in trying to gain a circuit decision in their favor. See Rodgers, *supra* note 4, at 1018 (footnote omitted):

The IRS claims that as a rule of thumb, it will conform to a judicial interpretation if faced with two or more adverse decisions, but the Service surrendered to insurance companies in Revenue Ruling 72-84 only after losing five decisions in court. The “dealers reserve” issue was litigated in the courts of six circuits before being resolved by the Supreme Court in 1959. In the latter instance, it should be noted that the IRS was at least dealing with a conflict among the circuits, losing in four circuits and winning in two before ultimately winning when the Supreme Court affirmed the judgment favorable to the Commissioner from the Seventh Circuit.

¹⁸The Department of Justice has stated that today “agency nonacquiescence is uncommon” and “[w]here the government has lost a legal issue in three circuits, the Solicitor General only rarely permits a fourth appellate test of the issue.” Letter from Andrew Fois, Assistant Attorney General, Department of Justice, to Honorable Henry J. Hyde, Chairman, Committee on the Judiciary (Sept. 17, 1997).

¹⁹Compliance Act Hearing, *supra*, note 14, at 27 (statement of Daniel J. Wiles, Deputy Associate Chief Counsel, Office of Chief Counsel, Internal Revenue Service); *Id.* at 22 (statement of Arthur Fried, Esq., General Counsel, Social Security Administration) The SSA issues “acquiescence rulings” which explain how it will apply the decisions of circuit courts that are at variance with the agency’s national policies. These “rulings” explain how SSA will apply the appellate court holding at all levels of adjudication in the same circuit. See also 62 Fed. Reg. 48,963 (Sept. 18, 1997) (proposed revisions to SSA rules on application of circuit precedent to administrative decision making).

²⁰Only last year, a court of appeals reversed an SSA decision applying regulations the court had invalidated in an earlier case. Although the agency explained its failure to observe the earlier precedent on grounds that an “acquiescence ruling” had not been issued, the court rejected that argument, noting:

Regardless of whether the Commissioner formally announces her acquiescence, however, she is still bound by the law of this Circuit and does not have the discretion to decide whether to adhere to it. “[T]he regulations of [SSA] are not the supreme law of the land. ‘It is, emphatically, the province and duty of the judicial department, to say what the law is,’ *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803) and the [Commissioner] will ignore that principle at [her] peril.” *Hillhouse v. Harris*, 715 F.2d

that rationale, the agency has become, in effect, a review level between the appellate courts and the Supreme Court, a view that the Committee does not share.²¹

The decision whether or not to acquiesce appears to be premised on the view that federal agencies apply legal principles from court rulings in the administration of a statutory program only for reasons of comity, not because the precedent is legally binding on the agency.²² As long as an agency holds the view that following controlling precedent is optional, the Committee believes that this bill is necessary. No one is above the law, especially federal agencies, whose officials are sworn to uphold the rule of law.²³

HEARINGS

The Subcommittee on Commercial and Administrative Law of the Judiciary Committee held a hearing on H.R. 1544, the "Federal Agency Compliance Act," on May 22, 1997. Testimony was received from the following eight witnesses: Judge Stephen H. Anderson of the United States Court of Appeals for the Tenth Circuit, representing the Judicial Conference of the United States; Arthur Fried, Esq., General Counsel of the Social Security Administration; Daniel J. Wiles, Esq., Deputy Associate Chief Counsel of the Internal Revenue Service; Stephen W. Preston, Esq., Deputy Assistant Attorney General, Civil Division of the Department of Justice; John Pickering, Esq., representing the American Bar Association; Professor Dan Coenen of the University of Georgia School of Law; James F. Allsup, Esq., of Allsup, Inc., an organization that represents Social Security disability and Medicare claimants; and Peter Ferrara, General Counsel and Chief Economist for Americans for Tax Reform.

COMMITTEE CONSIDERATION

On Thursday, July 24, 1997, the Subcommittee on Commercial and Administrative Law met in open session and ordered reported the bill H.R. 1544, by a voice vote, a quorum being present. On Wednesday, September 17, 1997, the Committee met in open ses-

428, 430 (8th Cir. 1983)(per curiam)(quoting *Hillhouse v. Harris*, 547 F.Supp. 88, 93 (W.D. Ark. 1982)).

Hutchison v. Chater, 99 F.3d 286, 287-88 (8th Cir. 1996) (bracketed language in opinion).

²¹ Concerned about delay in an agency following relevant precedent, the Committee adopted an amendment by Mr. Nadler aimed at dealing with the problem of agency officials such as administrative law judges, being barred by the agency from acquiescing until the agency formally accepted the court's ruling, for example, through the issuance by the Social Security Administration of an "Acquiescence Ruling." The Committee believes that federal agencies are not entitled to craft their own "grace periods" during which they may decline to observe the law as stated in an otherwise binding precedent. This amendment would make it possible for a claimant, for example, to bring a decision of a federal court of appeals to the attention of an administrative law judge, and have that law applied even in the absence of an "Acquiescence Ruling" or other agency action.

²² *United States Department of Energy v. Federal Labor Relations Authority*, 106 F.3d 1158, 1165 (4th Cir. 1997) (Luttig, J. concurring) (quoting letter from William Kanter, Deputy Director of the Justice Department's Civil Division Appellate Staff dated Nov. 14, 1996).

²³ In *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979), the court observed:

Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court. For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.

Id. at 970 (citation omitted). See also *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983).

sion and ordered reported favorably the bill H.R. 1544 with amendment by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

There were two amendments offered during full Committee consideration of H.R. 1544. Mr. Nadler offered an amendment, which was adopted by voice vote, providing that all officers and employees of an agency, including administrative law judges, are required to adhere to precedent. Ms. Jackson Lee offered an amendment, which was defeated by voice vote, to allow an agency to exercise its discretion not to acquiesce in an appellate court precedent if it determines that the precedent would impede the defense and protection of civil liberties or civil rights.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1544, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 4, 1997.

Hon. HENRY J. HYDE,
*Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1544, the Federal Agency Compliance Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Susanne S. Mehlman

(for federal costs), Kathy Ruffing (for social security), and Pearl Richardson (for revenues).

Sincerely,

JUNE E. O'NEILL, *Director*.

Enclosure.

H.R. 1544—Federal Agency Compliance Act

H.R. 1544 would require federal agencies to abide by appellate court precedents in a particular circuit when administering policies or regulations in that circuit, except under certain circumstances. The bill also would direct federal agencies to avoid unnecessary re-litigation of legal issues, especially in instances where three or more judicial circuits have handed down rulings unfavorable to the government.

Based on information from the Department of Justice, CBO believes that federal agencies are generally in compliance with federal law and that they usually exercise appropriate discretion when determining whether an appeal in any particular case is warranted. For example, the Social Security Administration (SSA)—one of the agencies potentially most affected by this bill—already has a policy on acquiescence that essentially meets the requirements of H.R. 1544. However, because its numerous administrative proceedings often involve contentious issues such as determining disability, SSA's administrators and administrative law judges (ALJs) occasionally differ as to the applicability of precedents in particular cases. This bill, by specifically reinforcing the obligation of administrative law judges to adhere to appeals court precedents for their particular circuit, could intensify those differences. In some cases, most likely causing ALJs to award disability benefits in more cases than they otherwise would. Spending or receipts of other agencies could be similarly affected. For example, the bill could result in a slight revenue loss to the government if it were to cause the Internal Revenue Service to adhere to appellate court precedents in particular circuits more than it otherwise would. In addition, the legislation might cause SSA and other agencies to devote more resources to monitoring their adjudicative proceedings. Such occurrences are likely to result in some increase in costs or decrease in revenues to the government, but CBO cannot predict the extent of these occurrences or their budgetary impact.

Because enactment of the bill could affect direct spending and receipts, pay-as-you-go procedures would apply. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would impose no costs on state, local, or tribal governments.

The CBO staff contacts for this estimate are Susanne S. Mehlman (for federal costs), Kathy Ruffing (for social security), and Pearl Richardson (for revenues). This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to rule XI, clause 2(1)(4) of the Rules of the House of Representatives, the Committee finds the authority for this legislation in Article I, section 8, clause 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 titles the bill as the “Federal Agency Compliance Act.”

Section 2. Prohibiting intracircuit agency nonacquiescence in appellate precedent

Section 2(a) adds a new section, Section 707, at the end of chapter 7 of title 5, United States Code, generally to prevent agencies from pursuing intracircuit nonacquiescence. More specifically, subsection (a) of section 707 provides that an agency must adhere to controlling precedent established by the United States court of appeals for a given judicial circuit in administering a statute, rule, regulation, program, or policy within that circuit. “Administering” includes agency action in an administrative or judicial context that is required or arises as part of the agency’s responsibilities under a statute, rule, regulation, program, or policy.

Section 707(a) also requires all officers and employees of an agency, including administrative law judges, to adhere to the controlling precedents in that circuit. To the extent that those precedents affect the official duties of such persons, they must act accordingly. This provision makes clear that agency acquiescence does not apply only to the Secretary or head of the agency. The Committee believes that citizens should be able to avail themselves of favorable circuit case law at every level of the administrative process.

Subsection (a) incorporates the same definition of “agency” applicable to other provisions of the Administrative Procedure Act. While the bill does not define the term “precedent,” it is intended to carry its common meaning—i.e., a decision that a court will consider as controlling authority for an identical or similar question of law within its jurisdiction. Requiring agencies to adhere within a given judicial circuit to the precedents established by the respective court of appeals, however, does not bind an agency to rulings premised on materially distinguishable facts or circumstances, nor does it limit an agency’s ability to seek clarification of earlier decisions.

The requirement to adhere to a precedent attaches once the decision in which the precedent is established becomes effective—i.e., when the mandate of the appellate court issues in accordance with Rule 41 of the Federal Rules of Appellate Procedure. If the parties in a case are bound by the lower appellate decision pending Supreme Court review, it is appropriate for that decision to serve as precedent in other indistinguishable cases.²⁴ Nevertheless, proceedings in such other cases might be stayed so that final action is not taken until after the Supreme Court acts.

²⁴ Under Rule 41(b) of the Federal Rules of Appellate Procedure, a party may seek a stay of the mandate.

Although the bill requires an agency to adhere to controlling appellate precedent concerning the laws the agency applies, it is not intended to alter the agency's prosecutorial or enforcement discretion as recognized in existing case law. Thus, even if a court of appeals decision establishes precedent in a given circuit on what acts or omissions constitute a violation of a particular law, this bill does not require an agency charged with enforcement of that law to initiate or continue administrative or judicial proceedings where an identical or similar act or omission occurs subsequently within that judicial circuit.

Subsection (b) of section 707 specifies those instances when an agency is not precluded from taking a position that is contrary to the controlling precedent established by a court of appeals within the same circuit. This subsection, in essence, establishes three exceptions to the requirement in subsection (a). If none of the three exceptions are applicable to the agency, then it must adhere to the applicable appellate precedent within that circuit.

The first exception, stated in section 707(b)(1), applies where the administration of a statute, rule, regulation, program, or policy could be subject to review by either the court of appeals that established that precedent or by a court of appeals for another circuit. This situation occurs where several venue options exist under the operative statute, and it is uncertain which circuit will ultimately consider proceedings for the pending claim or case.

For example, any person aggrieved by a final order of the National Labor Relations Board (NLRB) can seek review of such order in the circuit in which the unfair labor practice in question was alleged to have been engaged, in any circuit in which the person resides or transacts business, or in the United States Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f) (1994). Thus, during the administrative consideration of the alleged unfair labor practice, it may be uncertain which of the three potential circuits would review the Board's decision. Even where multiple venues are possible, the agency must adhere to any precedents uniformly established by each of the court of appeals in which venue may lie. And, in any event, appellate jurisdiction becomes certain once proceedings are initiated in federal court.

On the other hand, other agencies have more certainty in the venue options for judicial review. For example, while the Social Security Act provides for federal judicial review where the plaintiff resides or has his or her principal place of business, SSA decisions are typically reviewed within the circuit in which the claimant resides.²⁵

The second exception, stated in section 707(b)(2), recognizes that an agency should not be precluded from asserting a position contrary to precedent if the Government did not seek further review of the case in which that precedent was first established either in that court of appeals or in the United States Supreme Court because neither the Government nor any agency or officer thereof was a party to the case; or the decision establishing that precedent was otherwise substantially favorable to the Government. This section ensures that the court will have an opportunity to evaluate its

²⁵ See 42 U.S.C. § 405(g); see also Estreicher & Revesz, *supra* note 2, at 694.

precedents in the context of agency views and expertise that were not available in the earlier proceeding. In addition, there may be situations where the Government did not seek further review because the Government substantially prevailed in the case. The fact that the Government substantially prevails in a case should not bind it for all time to rulings on secondary or incidental issues that did not affect the ultimate result.

The third exception, stated in section 707(b)(3), recognizes that changes in the law or other relevant developments following the establishment of the precedent might make it reasonable to question its continued validity. These possible developments are: (1) a subsequent decision of that court of appeals or the United States Supreme Court; (2) a subsequent change in any pertinent statute or regulation; or (3) any other subsequent change in the public policy or circumstances on which that precedent was based. An agency should not seek to relitigate an issue on which there is established controlling precedent unless there are objectively reasonable grounds for believing that the appellate court, consistent with the principle of *stare decisis*, might decide the issue differently.

The first development listed above involves those instances where, in one or more cases subsequent to the establishment of the precedent, that same appellate court or the Supreme Court has indicated a possible need for reexamination of the issue by questioning the validity of the prior holding, indicating a desire to revisit the issue in a future case, or expressing frustration at the results of the application of the prior interpretation. The second development arises when Congress or the agency changes a statute, regulation, or rule that was interpreted in the precedent. Such a change, if substantive and relevant, might provide a basis for the court to overrule or modify its prior decision. The third development primarily concerns changes occurring during the passage of time. Shifts in public policy may sometimes make it reasonable to argue that an appellate court might approach the same issue differently. Also, after a court of appeals renders its decision, other appellate courts might interpret the provision at issue differently, thereby suggesting a change in circumstances that could lead the same court to reconsider its former precedent.

The bill does not purport to abrogate or limit any other rules or principles that may govern the acts or omissions of an agency. For example, H.R. 1544 does not diminish any existing obligations of agencies to acquiesce in appellate court decisions, nor does it otherwise affect existing law with respect to controlling precedent, the law of estoppel, or the ethical responsibility of parties and counsel to acknowledge and characterize faithfully any legal authority that may be relevant in a particular administrative or judicial proceeding.

H.R. 1544 adopts a balanced approach. The three general exceptions in section 707(b) provide federal agencies with sufficient flexibility to adhere to valid, established precedent so as not to interfere with continued development of the law. If an agency asserts the applicability of any of these three factors, a court will ultimately determine whether the factor is applicable. Thus, H.R. 1544 preserves the judiciary's constitutional role of interpreting the law, while allowing agencies to administer fairly their programs.

Section 2(b) is a conforming amendment to the table of sections at the beginning of chapter 7 of title 5, United States Code, that adds a reference to the new section 707.

Section 3. Preventing unnecessary agency relitigation in multiple circuits

Section 3 adds a new section 708 to chapter 7 of title 5, United States Code, that is intended to discourage, although not prohibit, intercircuit nonacquiescence. Section 708(a) requires the Department of Justice and the officers of any agency independently authorized to conduct litigation to ensure that the initiation, defense, and continuation of proceedings in federal court avoids unnecessarily repetitive litigation on questions of law already consistently resolved against the Government in multiple courts of appeals.

Section 708(a) discourages the Government from pursuing wasteful and abusive appeals and relitigating settled questions of law. This section provides a basic framework to guide Justice Department and other litigating agency officials in exercising their discretion to initiate, defend, or continue litigation of issues that one or more agencies have litigated repeatedly, but without success, in other circuits. This section does not apply when the Government was not a party in the cases in which the adverse appellate decisions were rendered.

Agencies are expected to give careful scrutiny when deciding whether to litigate questions of law that have been “consistently resolved” against the United States or an agency thereof by the United States courts of appeals for three or more circuits. If an agency in that situation intends to pursue the matter in yet another forum, it should be prepared to justify that decision based on the factors listed and any other relevant factors. This section applies to situations where all existing appellate case law is against the Government’s or agency’s position and is based on the same or similar rationale. It would not, however, be applicable if at least one circuit has decided a case on grounds consistent with the Government’s or agency’s position.

Section 708(b) identifies four factors that, among other relevant considerations, must be taken into account by supervising officials in deciding whether to initiate, defend, or continue litigation in light of the general mandate of subsection (a): (1) the effect of intervening changes in pertinent law or the public policy or circumstances on which the precedents were based; (2) subsequent decisions of the Supreme Court or of courts of appeals that previously decided the relevant questions of law; (3) the extent to which that question of law was fully and adequately litigated in the precedent-setting cases; and (4) the need to conserve judicial and parties’ resources. These factors provide general guidelines for litigation decisions similar to the criteria already utilized by the Solicitor General and other executive branch officials. They are flexible enough to permit the relitigation of exceptional cases with critical ramifications or highly unusual circumstances.

To justify a litigation decision, an agency should balance its chances for success in the present case against the burdens of additional litigation on other parties and the courts. Because the agency must weigh practical and programmatic considerations pecu-

liarly within its discretion or expertise, its compliance with this section in making that decision is not subject to judicial review, by mandamus or otherwise (section 708(d)). Instead, pursuant to section 708(c), the House and Senate Judiciary Committees will receive annual reports from the Attorney General on agencies' efforts to comply with subsection (a). This will enable the Committees to assess the extent of agency compliance and any need for additional legislation.

A conforming amendment changes the table of sections for chapter 7 of title 5, United States Code, to reflect the new section 708.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 17, 1997.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: We appreciate this opportunity to present the views of the Department of Justice on H.R. 1544, the "Federal Agency Compliance Act." For the reasons set forth in the Department's testimony of May 22, 1997, and summarized below, the Department strongly opposes the proposed legislation.¹

I

Section 2 of the bill (enacting new 5 U.S.C. § 707), which would require federal agencies to acquiesce in adverse court of appeals decisions within a judicial circuit except in certain enumerated circumstances, is unnecessary and would impair the flexibility needed in administrative and litigation decisionmaking. Moreover, this section could spawn a whole new species of useless litigation. We oppose this provision for essentially the same reasons that former Solicitor General Rex Lee opposed a similar provision in 1984, which the Congress declined to enact. A copy of former Solicitor General Lee's letter to the then-Chairman of the Senate Committee on Finance is enclosed.

Agency nonacquiescence is uncommon. Federal agencies generally act in accordance with legal principles announced in the holdings of appellate courts, except where extraordinary circumstances warrant continued litigation of a legal issue previously decided.

There are already significant checks that work quite well to prevent agencies from unreasonably refusing to acquiesce in circuit precedent. The principal check, of course, is that an adverse court of appeals' decision is generally a reliable indicator of how future cases in the same circuit will be decided; except where there is a point in relitigating, agencies have an obvious incentive to follow applicable precedent. Additional checks include the requirement of

¹On May 22, 1997, Deputy Assistant Attorney General Stephen W. Preston testified before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee on H.R. 1544. In connection with his testimony, Mr. Preston submitted a written statement that presents the Department's views on agency nonacquiescence in circuit precedent, as well as reasons why the Department opposes the proposed legislation.

Solicitor General approval to appeal any subsequent case in that circuit to the court of appeals, the Equal Access to Justice Act's authorization of attorney's fees against the government to the prevailing party unless the agency's position was "substantially justified," and the Justice Department's desire to maintain its credibility before the courts by not needlessly challenging circuit precedent.

We assume that the bill is not intended to require an agency to acquiesce in a circuit decision until after the time for the Solicitor General to seek Supreme Court review has expired, and the decision has therefore become final. But even if that problem is put to one side, the proposed legislation, if enacted, would unduly interfere with administrative and litigation decisionmaking that is necessarily discretionary and highly context-specific. The practical result would be to require the government to consider seeking Supreme Court review in cases in which the Solicitor General would otherwise forego further review. The bill would force an agency to choose between seeking further review of an adverse decision or acquiescing in that decision in situations in which the former is effectively unavailable and yet the latter is not necessarily appropriate. A statutory restriction of nonacquiescence to a few enumerated circumstances would be ill-advised because there are various—albeit infrequent—situations in which it may be entirely reasonable for the agency to persist in its position and seek to relitigate the issue.

To the extent that it would allow some form of judicial review of an agency's alleged failure to acquiesce, the proposed legislation stands to create a whole new category of litigation and, for that reason alone, is troubling. In many instances, court of appeals' decisions are ambiguous, and the precise extent of a court's actual holding may be unclear, especially with respect to cases involving different facts. The legislation could generate separate proceedings, even trials, on that and other issues—for example, on whether the prior decision was really substantially favorable to the government, or on whether it is reasonable to question the continued validity of that precedent. The enormous costs and burdens aside, it seems essentially pointless to invite premature and abstract litigation concerning the appropriateness of the agency's nonacquiescence and efforts to relitigate, as opposed to litigation concerning the substantive agency policy that is alleged to be inconsistent with circuit precedent and the merits of the underlying claims.

II

Proposed 5 U.S.C. § 708, which would require government officers to ensure that the United States not engage in "unnecessarily repetitive litigation" by continuing to litigate an issue of law that has been resolved against the government by three or more courts of appeals, is also unnecessary as a practical matter, and could inhibit the Solicitor General in protecting the interests of the United States.

Where the government has lost a legal issue in three circuits, the Solicitor General only rarely permits a fourth appellate test of the issue. While section 708 would not impose an inflexible barrier, it could inhibit the Solicitor General from seeking a circuit conflict in exceptionally important cases in which the government had suffered adverse decisions in three courts of appeals.

In nearly every Term, the Supreme Court issues a decision rejecting rulings of three or more courts of appeals. Since the Supreme Court is open to revisiting issues that seemed settled in the courts of appeals, the Solicitor General should have the discretion, where the stakes are important enough, to continue to seek a conflict and thus to facilitate Supreme Court review of decisions harmful to the United States.

The Department therefore strongly opposes both proposed 5 U.S.C. §§ 707 and 708. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report. Please feel free to call upon us if we may be of assistance in connection with this or any other matter.

Sincerely,

ANDREW FOIS,
Assistant Attorney General.

SECURITIES AND EXCHANGE COMMISSION,
Washington, DC, October 16, 1997.

Hon. GEORGE W. GEKAS,
*Chairman, Subcommittee on Commercial and Administrative Law,
Committee on the Judiciary, House of Representatives, Wash-
ington, DC.*

H.R. 1544, THE FEDERAL AGENCY COMPLIANCE ACT

DEAR CONGRESSMAN GEKAS: I appreciate this opportunity to express my concerns, as the General Counsel of the Securities and Exchange Commission, regarding the Federal Agency Compliance Act, H.R. 1544. I recognize that this bill has already been marked up in the House Committee on the Judiciary, but I hope that there may still be an opportunity to modify the proposed legislation as the legislative process moves forward.

I understand and support the core purpose of H.R. 1544—to rein in federal agencies that deliberately refuse to follow existing precedents of U.S. Courts of Appeals (called “agency nonacquiescence”). I assure you that the Commission, an independent regulatory agency, does not engage in such a practice. In fact, the Commission is careful to follow applicable appellate precedent in all of its litigation and administrative decisions.

I am concerned, however, that H.R. 1544 makes other fundamental changes in the current system of judicial review of agency cases that will significantly impair the Commission's ability to fulfill its congressional mandate to protect investors and preserve the integrity of the nation's securities markets.

There are several troublesome aspects of the bill. As explained below, these give rise to serious problems for the Commission, including the potential that H.R. 1544 could foreclose the Commission from asserting important but controversial legal theories because those theories have been rejected by three appellate courts, without the benefit of the Commission's expertise, in cases in which the Commission was not a party and did not participate. Moreover, adverse decisions by three courts of appeals could preclude the Commission from a legal theory even if a majority of appellate

courts endorsed it. The recent history of the “misappropriation” theory of insider trading, which is discussed more fully below, and which the Commission has used in some of its most significant securities fraud cases of the last fifteen years, illustrates the potential for unintended adverse consequences.

H.R. 1544 could foreclose the Commission from challenging ill-reasoned judicial decisions made without the Commission’s participation and expertise.

H.R. 1544 requires federal agency officials to avoid litigating questions of law already resolved against the government’s position in precedents established in three appellate circuits, even if a majority of the circuits have already endorsed the government’s position. Federal securities law is made not only in the Commission’s civil law enforcement litigation but in private securities litigation outside the Commission’s control and in criminal cases independently prosecuted by numerous United States Attorneys’ offices around the country. H.R. 1544 would bind the Commission by adverse decisions in those cases even though the Commission was not a party to, or participant in, those cases and even though the courts did not have the benefit of the Commission’s expertise.

Even if the portion of the legislation relating to the effect of adverse rulings by three courts of appeals were limited to government cases, I believe it would still be unwise to bind the Commission by precedents in criminal cases. Criminal prosecutors must devote their limited resources to more than just prosecuting securities law violations and may not be as well-equipped as the Commission to deal with the complex frontiers of the federal securities laws. Typically, the Commission is not involved in criminal prosecutions at the trial stage. The Commission may be consulted on an informal basis in some cases when the Department of Justice determines whether to appeal a criminal securities fraud case. If a criminal defendant appeals, however, the Commission may not learn about a case until a court of appeals renders its decision. As a result, adverse precedents specific to the securities laws administered by the Commission may develop without the Commission’s input.

Recent judicial developments in the “misappropriation theory” of insider trading illustrate the potentially adverse effects of H.R. 1544 on the evolution of the securities laws. Up to 50% of the Commission’s insider trading enforcement cases rely on the misappropriation theory, and many of our biggest cases were brought on that theory, such as *SEC v. Drexel Burnham Lambert*, *SEC v. Ivan Boesky*, and *SEC v. Dennis Levine*. Beginning in 1981, the Second, Seventh, and Ninth Circuits endorsed the theory, but in 1995 the Fourth Circuit rejected it in a criminal case. The Commission only became involved in the Fourth Circuit case after the adverse decision, when the government sought rehearing of the misappropriation issue by the full court. Rehearing was denied. The government did not seek Supreme Court review because the case was not a compelling one on the facts. Subsequently, the Eighth Circuit, following the Fourth Circuit’s lead, also rejected the misappropriation theory in a criminal case, reversing a conviction. The government sought Supreme Court review of the Eighth Circuit case, because the facts were far more favorable to the government. The Supreme

Court, fortunately, reversed the Eighth Circuit and upheld the misappropriation theory.¹ But events could easily have taken a different turn.²

If H.R. 1544 had been the law when the Eighth Circuit decided against misappropriation, and if the Supreme Court had not granted review, the legal theory would have been in jeopardy. Another criminal case involving the misappropriation theory could have arisen, and the Commission would have been at risk of losing an important legal theory: (1) without having had the opportunity itself to develop the arguments, and (2) even though the entire Second Circuit (sitting en banc) and two other courts of appeals had endorsed it.

A minority view could bar the Commission from taking a position actually endorsed by a majority of appellate judges.

H.R. 1544 bars an agency from taking a position “resolved” unfavorably in “precedents established” by three courts of appeals, regardless of whether one or two or even six or eight other circuits have ruled in favor of the position. Thus, it may be possible for a majority of appellate judges who address an issue to endorse a government position even while three courts of appeals reject it. As illustrated by the misappropriation theory example above, the potential that a minority view could become binding is not insignificant. The Fourth Circuit decision that first rejected the misappropriation theory departed from the views of three other courts of appeals.³ That decision was followed by the Eighth Circuit’s adverse decision. Even if a majority of the courts of appeals had endorsed the misappropriation theory, either before or after these two decisions, that majority of appellate courts ruling on the issue would not have prevented a minority from removing the theory from the Commission’s arsenal if just one more court had followed the Fourth and Eighth Circuits.

The Commission, like other agencies with independent litigating authority, would have special problems complying with H.R. 1544

The bill requires all government agencies to adhere to precedent in a specific circuit unless the government did not seek review because the decision was “otherwise substantially favorable” to the government. This would create significant problems for the Commission, and the other agencies with independent litigating authority. Where an agency has not participated in the decision by another agency not to seek review in a particular case, it may be difficult to determine the basis for not seeking review. Moreover, what may seem substantially favorable to one agency may not seem so to another; and it seems inappropriate to bind one agency on an issue of importance to it based on another agency’s determination

¹See *U.S. v. O'Hagan*, __ U.S. __, 117 S.Ct. 2199, 138 L. Ed. 2d 721 (June 25, 1997).

²The facts in the Eighth Circuit might have been less favorable for seeking review, for example. In any event, Supreme Court review is by no means certain. Indeed, the proposed legislation might make it more difficult to obtain Supreme Court review, since the government would be more likely to seek review in cases for which it would not have sought review before the legislation. Thus, H.R. 1544 would dramatically change the calculus for determining whether to seek review, with possibly unforeseen results.

³Actually, only one Fourth Circuit judge was sitting on the case. He wrote the opinion, in which the two district court judges sitting by designation concurred.

that an adverse ruling on that issue is not important to that other agency.

This also would curtail the independence of the Commission's litigating authority. The Commission would be foreclosed from appealing in cases in which another agency has declined to appeal for reasons other than that the decision was "substantially favorable" to the government.

H.R. 1544 would promote costly, unnecessary collateral litigation that would consume scarce enforcement resources.

H.R. 1544 seems to assume that precedent is always clear and unambiguous. The precise holding of many judicial decisions, however, is not clear, particularly in complex areas of the law such as securities regulation. Defendants in securities fraud cases often argue for broad readings of decisions adverse to the government.⁴ For this reason, the Commission's decision to pursue a case will frequently be open to attack under H.R. 1544. Although H.R. 1544 specifies that federal agencies and officials may not be subject to mandamus actions, the legislation would only encourage defendants to harass the Commission with claims for sanctions and the like for pressing disputed positions allegedly in violation of the restrictions of H.R. 1544.

H.R. 1544 reflects a balancing of interests that may be appropriate for the "cookie cutter" litigation of some agencies, but that would be detrimental to the kind of complex enforcement litigation in which the Commission engages

H.R. 1544 addresses problems that arise in "cookie cutter" litigation about which the Committee appears concerned, where the applicable principle is clear and is applied over and over again in administering a benefits program. This concern, however, does not apply to an enforcement litigation program such as the Commission's, which often involves questions about how prior decisions apply in new situations, as securities violators, ever-creative, engage in new schemes to defraud. The application of antifraud laws to new and evolving conduct is important.

Clearly, the Committee must balance the benefits H.R. 1544 would provide in resolving the problems of administering a benefits program that yields unfair results, against the problems H.R. 1544 would create for enforcement litigation programs like the Commission's. I recognize that in drafting H.R. 1544, the Committee has focused its attention on an area that the Committee has determined requires close attention. I believe, however, that the Commission's litigation does not raise the problems addressed by the legislation, and that including the Commission's enforcement litigation within the scope of H.R. 1544 would create problems that far outweigh any potential benefit of including the Commission's enforcement litigation. For this reason, I respectfully request that as

⁴The Commission, for example, has been repeatedly met with the argument that the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), which held that there is no private right of action for aiding and abetting securities fraud, governs in cases having nothing to do with aiding and abetting. Defendants contend that *Central Bank* stands for a variety of propositions, such as that the securities laws must be construed narrowly and that the purpose of the securities laws to protect investors has no bearing in interpreting the statutory text.

the bill moves forward, you consider whether appropriate amendments can be made to reduce the adverse effects of H.R. 1544 on enforcement litigation programs that routinely encounter novel issues requiring flexibility in their resolution. As currently drafted, H.R. 1544 does not distinguish between enforcement litigation to protect the public by stopping and preventing violations of law, and other kinds of agency litigation in which an agency seeks to apply “cookie cutter” principles.

In sum, I urge you to consider amending H.R. 1544 to avoid the problems it would create for the Commission. I would be happy to meet with you to discuss further how that might be done or to discuss in more detail the Commission’s concerns.

Sincerely,

RICHARD H. WALKER,
General Counsel.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * *

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 7—JUDICIAL REVIEW

Sec.

701. Application; definitions.

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707. *Adherence to court of appeals precedent.*

708. *Supervision of litigation; limiting unnecessary relitigation of legal issues.*

* * * * *

§ 707. *Adherence to court of appeals precedent*

(a) *Except as provided in subsection (b), an agency (as defined in section 701(b)(1) of this title) shall, in administering a statute, rule, regulation, program, or policy within a judicial circuit, adhere to the existing precedent respecting the interpretation and application of such statute, rule, regulation, program, or policy, as established by the decisions of the United States court of appeals for that circuit. All officers and employees of an agency, including administrative law judges, shall adhere to such precedent.*

(b) *An agency is not precluded under subsection (a) from taking a position, either in administration or litigation, that is at variance with precedent established by a United States court of appeals if—*

(1) it is not certain whether the administration of the statute, rule, regulation, program, or policy will be subject to review by the court of appeals that established that precedent or a court of appeals for another circuit;

(2) *the Government did not seek further review of the case in which that precedent was first established, in that court of appeals or the United States Supreme Court, because neither the United States nor any agency or officer thereof was a party to the case or because the decision establishing that precedent was otherwise substantially favorable to the Government; or*

(3) *it is reasonable to question the continued validity of that precedent in light of a subsequent decision of that court of appeals or the United States Supreme Court, a subsequent change in any pertinent statute or regulation, or any other subsequent change in the public policy or circumstances on which that precedent was based.*

§ 708. Supervision of litigation; limiting unnecessary relitigation of legal issues

(a) *In supervising the conduct of litigation, the officers of any agency of the United States authorized to conduct litigation, including the Department of Justice acting under sections 516 and 519 of title 28, United States Code, shall ensure that the initiation, defense, and continuation of proceedings in the courts of the United States within, or subject to the jurisdiction of, a particular judicial circuit avoids unnecessarily repetitive litigation on questions of law already consistently resolved against the position of the United States, or an agency or officer thereof, in precedents established by the United States courts of appeals for 3 or more other judicial circuits.*

(b) *Decisions on whether to initiate, defend, or continue litigation for purposes of subsection (a) shall take into account, among other relevant factors, the following:*

(1) *The effect of intervening changes in pertinent law or the public policy or circumstances on which the established precedents were based.*

(2) *Subsequent decisions of the United States Supreme Court or the courts of appeals that previously decided the relevant question of law.*

(3) *The extent to which that question of law was fully and adequately litigated in the cases in which the precedents were established.*

(4) *The need to conserve judicial and other parties' resources.*

(c) *The Attorney General shall report annually to the Committees on the Judiciary of the Senate and the House of Representatives on the efforts of the Department of Justice and other agencies to comply with subsection (a).*

(d) *A decision on whether to initiate, defend, or continue litigation is not subject to review in a court, by mandamus or otherwise, on the grounds that the decision violates subsection (a).*

* * * * *

DISSENTING VIEWS

As a general matter, we agree that agencies should comply with circuit court decisions. However, we dissent from H.R. 1544, the “Federal Agency Compliance Act,” because we believe it to be an inappropriate means of responding to the perceived problem of nonacquiescence.

In attempting to diminish the instances of nonacquiescence, H.R. 1544 would create significant new problems. It would indiscriminately reduce the discretionary authority of every federal agency to decide when to challenge circuit court decisions, not just the agencies that legislative proponents claim have abused their discretion. In doing so, H.R. 1544 would diminish the effectiveness of the agencies that protect the rights of our citizens under the labor, civil rights, environmental, and other important laws. Moreover, the terms of H.R. 1544 are so vague that they will inevitably lead to uncertainty and confusion concerning their scope and applicability.

It is for these reasons that the Department of Justice opposes H.R. 1544, which would likely lead to a Presidential veto if it passes. And it is for these reasons that groups such as the AFL-CIO¹ and the Mexican American Legal Defense and Educational Fund² strongly oppose its passage. We join in dissenting from this well intentioned, but ultimately misguided legislation.

SUMMARY OF LEGISLATION

H.R. 1544 attempts to curb the perceived problem of “intracircuit nonacquiescence”³ by legislatively mandating that federal executive branch agencies adhere to precedents of the courts of appeals for disputes which arise within a particular circuit.⁴ The legislation only permits an agency to take a contrary position to such precedent where: (1) it is not certain whether the issue in question “will be subject to review by the court of appeals that established that precedent or a court of appeals for another circuit;” (2) the Government did not seek further review of the case in which that precedent was established “because neither the United States nor any agency or officer thereof was a party to the case” or “because the decision establishing that precedent was otherwise substantially favorable to the Government;” or (3) “it is reasonable to question the continued validity of that precedent in light of a subsequent decision of that court of appeals or the United States Supreme Court,” a subsequent change in the law, or any other subsequent change “in the public policy or circumstances on which that precedent was

¹Letter from Peggy Taylor, Director for Dept. of Legislation, American Federation of Labor and Congress of Industrial Organizations (Oct. 27, 1997) [hereinafter AFL-CIO Letter].

²Letter from Antonia Hernandez, President and General Counsel of Mexican American Legal Defense and Educational Fund, to the Hon. Henry J. Hyde, Chairman, Committee on the Judiciary (Nov. 3, 1997) [hereinafter MALDEF Letter].

³Agency failure to comply with circuit court precedent within a particular circuit.

⁴H.R. 1544, 105th Cong., 1st Sess. (1997) [hereinafter H.R. 1544].

based.” The bill also permits agency adjudicators to determine their own binding interpretations of circuit court precedents.⁵

H.R. 1544 addresses the perceived problem of “intercircuit non-acquiescence”⁶ by requiring federal agencies to comply with precedents established by the courts of appeals in three or more judicial circuits for disputes which arise outside of those circuits. In determining whether to challenge such precedents, the agency is required to consider (1) “the effect of intervening changes in pertinent law or the public policy” or other changes in circumstances; (2) “subsequent decisions of the United States Supreme Court or the courts of appeals that previously decided the relevant question of law;” (3) “the extent to which that question of law was fully and adequately litigated” when the precedents were established; and (4) “the need to conserve judicial and other parties’ resources.”⁷

I. H.R. 1544 is unnecessary

In our view, H.R. 1544 is a “solution in search of a problem.” The Department of Justice testified that except where extraordinary circumstances warrant continued litigation of a legal issue previously decided, federal agencies follow the holding of the circuit courts of appeals.⁸ Congressional intervention is particularly unnecessary with respect to the many agencies that depend on the Justice Department for their federal court litigation⁹ due to the appellate restrictions already imposed on them by the Solicitor General’s office. As Deputy Assistant Attorney General Preston explained:

In cases within the litigation authority of the Department of Justice, the Solicitor General must approve any appeal to a court of appeals. 28 C.F.R. 0.20. Where the government has lost a legal issue in three circuits, an agency would ordinarily have an uphill battle in persuading the Solicitor General to authorize an appeal to still another circuit. The appeal authorization process is a rigorous one, and it is an unusual legal issue or set of circumstances that would prompt the Solicitor General to permit a fourth appellate test.¹⁰

Agencies are also hesitant to challenge court precedent because they face the possibility of paying other parties’ attorneys fees under the Equal Access to Justice Act if it is determined that the government position was not “substantially justified.”¹¹

The Social Security Administration (“SSA”) is the agency that was criticized most frequently at the hearing on H.R. 1544 before

⁵Id. § 2.

⁶Agency failure to adhere to precedents outside a particular circuit.

⁷H.R. 1544, supra n. 4 § 3.

⁸See Hearing on H.R. 1544, Proposing The Federal Agency Compliance Act Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 105th Cong., 1st Sess. (May 22, 1997) (forthcoming) [hereinafter 1997 House Judiciary Hearings] (statement of Stephen W. Preston at 1).

⁹28 U.S.C. § 516 (1993) (except as otherwise authorized by law, the conduct of litigation in which an agency is a party is reserved to the Department of Justice).

¹⁰See 1997 House Judiciary Hearings, supra n. 8 (statement of Stephen W. Preston at 7).

¹¹28 U.S.C. § 2412(d)(1)(A) (1994) (except as otherwise specifically provided by statute, a court shall award to a prevailing party in any civil action, other than the United States, fees and other expenses incurred by the party unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust).

the Subcommittee on Commercial and Administrative Law.¹² SSA, however, has taken several actions to ameliorate the problem of nonacquiescence. Prior to June of 1985, when a circuit court decision was inconsistent with SSA's interpretation of the law and regulations, their practice was to apply the decision only to the named litigants in that particular case. In June of 1985, however, SSA announced a new policy wherein they would apply such circuit court decisions at the hearings level, following an acquiescence ruling, in adjudicating claims in the circuit.¹³ In 1990, SSA went even further adopting an explicit rule requiring such intracircuit acquiescence.¹⁴ As recently as September 18, 1997, SSA responded to concern that it occasionally takes too long to issue its acquiescence rulings by publishing a proposed regulation requiring it to offer litigants preliminary guidance within 10 days and requiring it either to appeal the circuit court decision or to adopt an appropriate acquiescence ruling within 120 days. In addition to publishing acquiescence rulings when they are issued, SSA will be required to identify and notify individuals whose cases may be affected by them.¹⁵

II. H.R. 1544's categorical restrictions diminish needed discretion

H.R. 1544's narrowing of agency discretion over whether to challenge circuit court precedents would have a number of adverse policy consequences. As noted above, H.R. 1544 provides only three exceptions to the intracircuit acquiescence rule.¹⁶ It omits a number of other justifiable exceptions—such as cases including two alternative holdings (only one of which the agency likes) or cases involving litigation fact patterns which do not lend themselves to Supreme Court review (e.g., cases involving sympathetic parties violating important laws). The net result will be to unduly hamstring the government in developing its litigation strategies.

This is one of the principal reasons why initiatives of this nature have been opposed on a bipartisan basis. Rex Lee, Solicitor General under President Reagan, argued that a similar 1984 bill¹⁷ “represents an unprecedented interference with the ability of the Jus-

¹²See 1997 House Judiciary Hearings, supra n. 8, transcript at 17, 22–23, 45–46, 75–76, 83, 86–92, 99–100, 102, and 106.

¹³See 1997 House Judiciary Hearings, supra n. 8 (statement of Arthur J. Fried, General Counsel, Social Security Administration at 2).

¹⁴20 C.F.R. § 404.985 a–c (1990) (SSA will apply a holding from a federal circuit court which conflicts with SSA legal interpretations, and publish an acquiescence ruling, unless SSA seeks further review or decides to relitigate the issue despite an acquiescence ruling after consulting the Department of Justice).

¹⁵20 C.F.R. § 416.1485 (1997).

¹⁶H.R. 1544, supra n. 4, § 2 (I) it is not certain whether the issue will be subject to review by the court of appeals that established the precedent; (II) the government did not seek further review of the case in which the precedent was established because it was not a party to that case or the decision was otherwise substantially favorable; and (III) it is reasonable to question the continued validity of the precedent).

¹⁷Congress previously sought to address this matter with reference to SSA in 1984, during proceedings leading up to the enactment of the Social Security Disability Benefits Reform Act, Pub. L. No. 98–460, 98 Stat. 1794. Prior to enactment of the final legislation, the House passed a bill that would have required the SSA to acquiesce to circuit court precedent in social security disability benefits cases unless it sought Supreme Court review. See H.R. Rep. 98–618, 98th Cong., 2d Sess. 22–26 (1984). The Senate bill did not contain such a provision; instead it would have required the SSA to publish a notice of nonacquiescence whenever it determined not to acquiesce. See S. Rep. 98–466, 98th Cong., 2d Sess. 21 (1984). Congress ultimately declined to include any provision on nonacquiescence in the Act as finally passed. Rather than impose statutory restrictions on nonacquiescence in the 1984 legislation, the conferees urged SSA to change its policy of nonacquiescence. See H.R. Conf. Rep. No. 1039, 98th Cong., 2d Sess. 37, (1984).

tice Department to determine the cases it will appeal.”¹⁸ Similarly, in their recent testimony opposing H.R. 1544, the Clinton Justice Department explained that the bill would significantly undermine “the Solicitor General’s role in carefully screening cases in which to seek Supreme Court review, and in implementing the government’s litigation and substantive policies in doing so.”¹⁹

Preserving the litigation prerogatives of our agencies is an important function of separation of powers and helps foster development of the case law. For example, in *United States v. Mendoza*,²⁰ a unanimous Supreme Court held that the government could not be foreclosed from relitigating a legal issue it had previously litigated unsuccessfully in another action against a different party, even within the same judicial circuit:

Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at governmental action many constitutional questions can arise only in the context of litigation to which the government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues. A rule allowing non-mutual collateral estoppel against the government in such cases could substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.²¹

It is particularly important to recognize that all of the federal agencies are unique in some respects and therefore that the categorical prohibitions of H.R. 1544 would affect each agency differently. Richard H. Walker, the General Counsel of the Securities and Exchange Commission, highlighted the problems that his agency would face under the bill:

H.R. 1544 addresses problems that arise in “cookie cutter” litigation about which the Committee appears concerned, where the applicable principle is clear and is applied over and over again in administering a benefits program. This concern, however, does not apply to an enforcement litigation program such as the Commission’s, which often involves questions about how prior decisions apply in new situations, as securities violators, ever-creative, engage in new schemes to defraud. The application of anti-fraud laws to new and evolving conduct is important.²²

¹⁸ 130 Cong. Rec. S11454 (1984) (Letter by Rex Lee, Solicitor General, to Hon. Robert Dole).

¹⁹ 1997 House Judiciary Hearings, supra n. 8 (statement of Stephen W. Preston at 4).

²⁰ 464 U.S. 154 (1984).

²¹ Id. at 160.

²² Letter from Richard H. Walker, General Counsel, United States Securities and Exchange Commission, to the Hon. Barney Frank (Oct. 16, 1997) [hereinafter SEC Letter].

The SEC went on to explain how acquiescence rules could prove to be particularly damaging to them since they do not have the opportunity to challenge adverse precedents in criminal cases²³ which can have an adverse impact on the SEC's ability to bring civil cases.²⁴ A number of the independent agencies will face this same inequity under the bill—they will find themselves hamstrung by circuit court precedent litigated by the Justice Department, but which the agency had no part in crafting. This is a serious flaw in H.R. 1544.

The provision of H.R. 1544 allowing individual agency adjudicators to develop their own interpretations of circuit court decisions²⁵ would also create particularly serious problems for some agencies. This mandate could allow decision makers at the initial and reconsideration levels of agency review who do not have any legal training in interpreting and applying court decisions to develop binding legal decisions.²⁶ For the Social Security Administration, this mandate could pave the way for a myriad of conflicting legal interpretations. As SSA General Counsel Arthur Fried noted:

If each of SSA's thousands of decision makers were responsible for interpreting circuit court holdings, it could result in conflicting decisions by different decision makers, even within the same circuit. SSA would have no way to ensure uniform application of eligibility standards as required by law, leading to further litigation.²⁷

Finally, the requirement that an agency generally must comply with adverse precedents issued by three circuit courts is unduly restrictive. A review of the most recent Supreme Court terms reveals that it is not at all unusual for the Court to issue a decision rejecting rulings of three or more courts of appeals.²⁸ The SEC also has explained how a three circuit rule could have had a serious adverse impact on the development of securities law and made it more difficult to successfully prosecute inside trading perpetrators.²⁹

III. H.R. 1544 is opened-ended and vague

Implementation of the provisions in H.R. 1544 would require the interpretation of terms that are inherently vague and ambiguous in their meaning. Under the legislation, even seemingly appropriate exercises of discretion might be subject to challenge. For instance, circuit court decisions frequently are subject to a variety of legal

²³ The Justice Department has criminal jurisdiction over the securities laws.

²⁴ For example, several circuit courts issued adverse precedents in criminal cases negating the "misappropriation theory" used to challenge insider trading before the Supreme Court ultimately adopted the SEC's view. See *U.S. v. O'Hagan*, __ U.S. __, 117 S.Ct. 2199, 138 L.Ed. 2271 (June 25, 1997).

²⁵ H.R. 1544, supra n. 4, § 2.

²⁶ Letter from Arthur J. Fried, General Counsel for Social Security Administration, to the Hon. George W. Gekas, Chairman, Subcomm. on Commercial and Administrative Law (July 7, 1997) [hereinafter Fried Letter].

²⁷ See, e.g., 1997 House Judiciary Hearings, supra n. 8 (statement of Arthur J. Fried at 3).

²⁸ See, e.g., *United States v. Gaudin*, 115 S.Ct. 2310 (1995) (in affirming Ninth Circuit ruling that materiality of false statement under 18 U.S.C. 1001 was jury question, Supreme Court in effect rejected the decision of every other circuit to have considered the issue, except the Federal Circuit); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1995) (Supreme Court rejected private right of action against aiders and abettors under Securities Exchange Act, which all 11 courts of appeal to have considered the question have recognized); *United States v. Texas*, 507 U.S. 529 (1993) (Supreme Court rejected construction of Debt Collection Act adopted by three circuits before circuit conflict arose).

²⁹ See SEC Letter, supra n. 22.

interpretations. It may not be possible to ascertain a decision's true scope and effect until an opportunity arises to test it by presenting the same court of appeals with a different factual scenario. Rather than challenging a precedent, an agency may merely be attempting to limit its effect. However, under H.R. 1544, such a legitimate strategy could be subject to challenge as violating the new acquiescence rules.

In addition, the exceptions in the bill which allow an agency to challenge precedents are inherently subjective. In deciding whether to take a position at variance with intracircuit precedent, the agency must make determinations such as whether the government did not seek further review of the case because the precedent was "otherwise substantially favorable." Another subjective exception would require the agency to determine whether "it is reasonable to question the continued validity of that precedent."³⁰ The exceptions that apply to intercircuit precedents present similar problems. Here the agency must consider such open-ended factors as "the effect of intervening changes" in law and policy, "the extent to which that question of law was fully and adequately litigated," and "the need to conserve judicial and other parties' resources."³¹

Accordingly, the enactment of H.R. 1544 ultimately could create a whole new category of litigation. This would result in wasteful preliminary litigation over whether a case can proceed, in addition to litigation over the substance of the dispute. This type of collateral litigation is costly; it consumes scarce enforcement resources; and it can create the very type of delay that H.R. 1544 is intended to avoid.

IV. H.R. 1544 will harm enforcement of the labor and environmental laws and the civil rights laws

Perhaps most seriously, we oppose H.R. 1544 because of the adverse consequences it will have on the ability of government agencies to protect our citizens' rights under important laws concerning labor, employment, workplace safety, civil rights, and the environment, to name but a few.

H.R. 1544 will force agencies such as the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Justice Department Civil Rights Division, the Environmental Protection Agency, and the Bureau of Land Management to litigate from a disadvantageous position. Unlike the well-funded interests the government frequently opposes in court, under the bill, the agencies will face complex new legal constraints when they determine which cases to appeal. To the extent this translates into less capable enforcement of these important laws, we will all be disadvantaged.

It is for these reasons, among others, that the AFL-CIO has taken a position strongly opposing H.R. 1544, writing:

The AFL-CIO is particularly concerned about how this bill would affect agencies that enforce labor and employment laws. Although the text of the bill does not single out

³⁰ H.R. 1544, *supra* n. 4, § 3.

³¹ *Id.*

any particular federal agency, the National Labor Relations Board (NLRB) has come under severe attack in this Congress. This bill would prevent agencies with jurisdiction over labor matters from properly enforcing the labor and employment laws.³²

The same concerns lie with civil rights enforcement. At the Subcommittee markup, Rep. Jackson-Lee singled out her concern for the adverse impact H.R. 1544 would have in this critical legal area:

The bottom line is how would a legislative initiative of this kind limit the ability of federal entities to address the systematic encroachment of the judicial branch upon the civil liberties of the average citizen. Particularly, the Department of Justice (its Civil Rights Division) and the Civil Rights Divisions of various federal agencies (e.g. The Department of Health and Human Services), would be my primary focus in this categorical objection to the language of H.R. 1544. The limitation on these agencies' ability to appeal seemingly unjust circuit court decisions to the Supreme Court (i.e. autonomy of relitigation) in addition to their ability to create novel and ingenious ways of protecting the rights of citizens, is a sacred craft that should be regulated only with the highest and most hesitant level of scrutiny. We must do all we can to ensure efficient and effective government, but not at the expense of our civil rights and liberties.³³

Similarly, the Mexican American Legal Defense and Educational Fund, a staunch defender of civil rights, has taken a position against H.R. 1544, noting, among other things,

* * * [b]y limiting each agency's discretion in determining the cases it will appeal, agencies such as the *U.S. Department of Justice* and the Social Security Administration can only do *less* to adequately and legally interpret and pursue particular cases deemed to be significant in determining substantive policy.³⁴

H.R. 1544 would also hamstring enforcement of a range of laws designed to protect the environment. This is why the EPA concurred with the Department of Justice in opposing the legislation. In introducing the Senate counterpart legislation to H.R. 1544 (S. 1166), Senator Campbell (R-CO), telegraphed his intention of limiting the ability of the Bureau of Land Management to protect federal lands from grazing damage:

When the Bureau of Land Management recently proposed reform regulations for grazing permits, ranchers challenged the new provisions. After exhausting all administrative remedies, the ranchers took their case to court. Following lengthy and costly litigation, the appellate court ruled in favor of the ranchers. However, under the non-

³² AFL-CIO Letter, supra n. 1.

³³ Markup of H.R. 1544, The Federal Agency Compliance Act, Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 105th Cong., 1st Sess. (July 24, 1997) (statement of Rep. Jackson-Lee).

³⁴ MALDEF Letter, supra n. 2 (emphasis added).

acquiescence policy, the BLM could refuse to abide by this ruling each and every time this issue arises.³⁵

We are aware that some would argue that the fact that under the bill agencies would be constrained in developing their litigation strategies could be a positive or negative development, depending on the political orientation of the Administration. In our view, however, this argument ignores the fact that by and large agencies are in the posture of seeking to enforce laws designed to protect our workplace safety, civil rights, and environmental safeguards against culpable parties. If an agency chooses not to protect these rights, it doesn't need the "cover" of acquiescence requirements such as those set forth in H.R. 1544—the agency can simply exercise its discretion not to bring particular enforcement actions. It is only those agencies who desire to enforce these laws against recalcitrant interests which will face new difficulties under H.R. 1544. We therefore reject the assertion that H.R. 1544 will have a neutral impact on both pro- and anti-enforcement Administrations.

CONCLUSION

In our view, supporters of H.R. 1544 have not established that abusive nonacquiescence exists on a sufficiently wide-spread basis to justify legislation limiting the litigation authority of every agency in the government. In an effort to assist people who are having difficulty enforcing their own individual rights, H.R. 1544 would reduce the effectiveness of the agencies that are charged with the responsibility of protecting the rights of our citizens as a whole, including critical safeguards concerning employment rights, civil rights, and the environment.

We believe that on the rare occasions when dangerous legal precedents are written—such as *Dredd Scott v. Sanford* (denying slaves constitutional rights),³⁶ *Plessy v. Ferguson* (upholding "separate but equal" facilities),³⁷ and *Korematsu v. United States* (Japanese-American interment upheld)³⁸—our agencies should have unfettered discretion to challenge them. Accordingly, we dissent from this legislation.

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³⁵ 143 Cong. Rec. S9211 (daily ed. Sept. 11, 1997) (statement of Sen. Campbell).

³⁶ 60 U.S. 393 (1856).

³⁷ 163 U.S. 537 (1896).

³⁸ 324 U.S. 885 (1944).